Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	
	)	

Reply Comments of the
Office of Advocacy, U.S. Small Business Administration
on the Final Regulatory Flexibility Analysis,
and the Initial Regulatory Flexibility Analysis of the
First Report and Order and Further Notice of Proposed Rulemaking

The Office of Advocacy of the United States Small Business Administration ("Advocacy") submits these Reply Comments to the Federal Communications Commission's ("FCC" or "Commission") *First Report and Order and Further Notice of Proposed Rulemaking* ("FNPRM"),[1] in the above-captioned proceeding. While Advocacy agrees that the Commission has statutory authority to require line sharing and that it is in the public interest to do so, Advocacy believes that the FNPRM is vague and does not provide sufficient notice to provide a basis for a rulemaking. In addition, the Commission's regulatory flexibility analyses do not satisfy the requirements of the Regulatory Flexibility Act. Advocacy recommends that the FCC consider comments received in response to the FNPRM but issue a second further notice of proposed rulemaking along with revised regulatory flexibility analyses before adopting rules regarding line sharing.

[1] *In re* Deployment of Wireline Services Offering Advanced Telecommunications Capability, *First Report and Order, and Further Notice of Proposed Rulemaking*, CC Docket No. 98-147, FCC 99-48 (rel. March 31, 1999).

Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305[2] to represent the views and interests of small business within the Federal government. Its statutory duties include serving as a focal point for concerns regarding the government's policies as they affect small business, developing proposals for changes in Federal agencies' policies, and communicating these proposals to the agencies.[3] Advocacy also has a statutory duty to monitor and report on the Commission's compliance with the Regulatory Flexibility Act of 1980 ("RFA"),[4] as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Subtitle II of the Contract with America Advancement Act.[5]

Advocacy agrees with the Commission that it has the statutory authority to require line sharing of voice and broadband services on the same line and that it is in the public interest to do so. However, Advocacy believes that the FNPRM on line sharing is vague and does not provide sufficient notice to provide a basis for a rulemaking. Also, the Commission's Initial Regulatory Flexibility Analysis ("IRFA") on line sharing is flawed because the FNPRM does not accurately identify all small businesses impacted, adequately detail the compliance burdens, or discuss alternates to minimize the regulatory burden on small businesses. Lastly, the Final Regulatory Flexibility Analysis ("FRFA") is flawed because the Commission did not remedy the insufficient notice of the IRFA to the Notice of Proposed Rulemaking, and it cannot rely upon third-party comments to excuse it's statutory duty under the RFA as it stated in. Advocacy recommends that the FCC take all comments received in response to the FNPRM into consideration, but it should issue a second Further Notice of Proposed Rulemaking along with a revised IRFA.

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2 Codified as amended at 15 U.S.C. §§ 634 a-g, 637.
3 15 U.S.C. § 634c(1)-(4).
4 Pub. L. No. 96-354, 94 Stat. 1164 (1980)(codified at 5 U.S.C. § 601 et seq.).
5 Pub. L. No. 104-121, 110 Stat. 857 (1996)(codified at 5 U.S.C. § 612(a)).

1. The FNPRM Is Vague and Does Not Provide Sufficient Notice to Provide a Basis for a Rulemaking.

Advocacy strongly believes that the FNPRM does not provide sufficient notice of the proposal and fails to address adequate crucial issues of pricing. In practical effect, the language of the FNPRM seemed more suited to a Notice of Inquiry than a proposed rule. Basing a final order on this notice may jeopardize the rule if it is challenged in court, which would be unfortunate as Advocacy supports the Commission's intention to ensure competition in the broadband market. To avoid exposing this potential Achilles heal, Advocacy recommends that the Commission issue a second further notice of proposed rulemaking to expand and clarify its proposal before issuing a final order.

Sufficiency of notice is a crucial part of the rulemaking process. The Administrative Procedure Act ("APA") requires a federal agency to provide general notice of a proposed rulemaking which will include "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[6] Courts have interpreted this duty to mean that the agency must fairly appraise interested persons of the subjects and issues the agency is considering.[7] The standard for whether interested persons have been fairly appraised varies with the facts in each case.[8]

Several of the comments received by the Commission point out the serious and complicated questions that are discussed only in vague terms in the FNPRM. The United States Telephone Association raised questions of the allocation of technical and operation concerns in its comments.[9] AT&T called attention to the lack of discussion on cost allocation in the

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6 5 U.S.C. § 553(b)(3)

7 *United Steelworkers of America v. Schuylkill Metals Corp.*, 828 F.2d 314, 317 (5th Cir. 1987).

8 *American Medical Ass'n v. United States*, 887 F.2d 760, 768 (7th Cir. 1989).

9 Comments of the United States Telephone Association, to the *Further Notice of Proposed Rulemaking* in CC Dkt. No. 98-147 at 26 (June 15, 1999).

FNPRM.[10] These issues, which are complex and crucial to compliance, are only discussed in a single paragraph in the FNPRM which provides no explicit indication of what the Commission is proposing.[11] Instead, the Commission states that it seeks comment on the economic, pricing, and cost allocation issues that may arise from line sharing without any further clarification.[12]

As Advocacy stated above, the Commission's treatment of the economic, pricing, and cost allocation issues is more in keeping with a Notice of Inquiry rather than a proposed rulemaking. This vague language does impart any sense of what rules the Commission intends to adopt and does not fully appraise interested parties of the issues that the Commission is considering. Therefore, Advocacy believes that the FNPRM does not provide sufficient notice under the APA. Basing a rulemaking on this FNPRM would be arbitrary and capricious. Advocacy therefore recommends that the Commission issue a second further notice of proposed rulemaking on the specifics of the issues of cost and operational concerns. A clearer and expanded proposal, accompanied by a discussion of the issues under consideration, will result in better comments and a stronger foundation for a later order.

2. The FNPRM's IRFA Does Not Accurately Identify Small Businesses, Adequately Detail the Compliance Burdens, or Discuss Alternates to Minimize the Regulatory Burden on Small Entities

The vagueness of the FNPRM clearly inhibits the Commission's ability to prepare an accurate IRFA in compliance with the goals of the RFA. A clearer and expanded notice could rectify many of our concerns with the analysis. These concerns are as follows:

First, the Commission does not accurately identify all small entities affected because it did not identify small incumbent local exchange carriers ("ILECs") as small entities, as pointed

[10] Comments of AT&T, to the *Further Notice of Proposed Rulemaking* in CC Dkt. No. 98-147 at 19 (June 15, 1999).
[11] FNPRM, para. 106.
[12] *Id*.

out by the Rural Telephone Coalition[13]. In a recent letter to the Commission, Advocacy advised the Commission that it was violating the RFA in several agency rulemakings by failing by failing to identify small ILECs as small entities in its regulatory flexibility analyses.[14] Under the RFA and the Small Business Act, the Small Business Administration ("SBA") has the statutory authority to determine size standards. Unfortunately, the FCC has ignored the Small Business Act and the RFA, and the size standards used in this proposal are not in compliance.[15] Advocacy again requests that the Commission bring its size standards into accord with the SBA, as continued denial of small ILECs as small entities is contrary to the letter and spirit of the Small Business Act and the RFA.

Second, while the Commission does list the issues on which the FCC is seeking comment,[16] the IRFA does not describe the possible reporting, recordkeeping, and other compliance requirements as required by the RFA.[17] Presumably the Commission's difficulty in describing compliance requirements stems from the vagueness of the proposals contained in the FNPRM, as discussed above. Should the Commission accept Advocacy's advice and issue a second FNPRM, it can revise the IRFA at that time to describe the compliance burdens adequately. A revised IRFA would provide the public with information on the public record to support the Commission's premise and conclusion that line-sharing is feasible, viable, and valid.

Third, Advocacy found the Commission's consideration of alleged alternatives in its IRFA to minimize burdens on small entities illusory, as the IRFA did not discuss any alternatives

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13 Comments of the Rural Telephone Coalition, to the *Further Notice of Proposed Rulemaking* in CC Dkt. No. 98-147 at 16 (June 15, 1999).

14 Letter from Jere W. Glover, Chief Counsel, Office of Advocacy U.S. Small Business Administration, to William Kennard, Chairman, Federal Communications Commission, CC Dkt. 98-147, CC Dkt. 99-68, CC Dkt. 97-181 (May 27, 1999).

15 FNPRM, Appendix C, para. 8.

16 FNPRM, Appendix C, para. 11.

17 5 U.S.C. § 603(b)(4).

at all. The Commission statement that the proposals made in the FNPRM placed the minimum burden on small entities is unsupported by any analysis of what burdens are imposed or any justification for this conclusion.[18] At the very least, the Commission must consider the four alternatives laid out by Congress in the RFA: (1) differing compliance requirements or timetables, (2) clarification, consolidation, or simplification of compliance requirements, (3) use of performance rather than design standards, and (4) and exemption – either in whole or in part – for small entities. [19] An analysis of the compliance burdens and alternatives that would minimize burden while still achieving the Commission's goals is an important part of a regulatory flexibility review, and the Commission needs to pay careful attention to these parts of the IRFA.

3. The Report and Order's FRFA Does Not Satisfy the Requirements of the RFA

a. The Report and Order's FRFA Was Based on an Insufficient IRFA and Is Flawed

Advocacy acknowledges that the Commission's FRFA comes closer to satisfying the requirements of the RFA than the IRFA in the Notice of Proposed Rulemaking. The Commission covered each of the components as required by the statute in sufficient detail to provide small businesses with an understanding of what will be required of them. We are particularly impressed by the Commission's detailed description of the compliance requirements and it's discussion of the alternatives considered to minimize the impact on small entities, which are both typically trouble-spots in FCC's RFA compliance as discussed above.

However, the Commission declined Advocacy's advice from our comment and did not revise and resubmit an IRFA.[20] Specifically, the Commission said:

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[18] FNPRM, Appendix C, para. 12.
[19] 5 U.S.C. § 603(c)(1-4).
[20] Comments of the Office of Advocacy, to the *Notice of Proposed Rulemaking* in CC Dkt. No. 98-147 (September 25, 1998).

> We also do not agree with SBA's contention that our IRFA was not sufficiently detailed to generate "meaningful comments on the impact of the proposed rules." The comments of the SBA, the National Rural Telecom Association, and the Organization for the promotion and Advancement of Small Telecommunications Companies, among others, provided more than sufficient detail for us to prepare this FRFA.[21]

Advocacy strongly disagrees with the Commission's view that comments generated in response to an incomplete insufficient IRFA are adequate to prepare the FRFA. Because the Commission did not give adequate notice in the IRFA concerning the nature, scope, and impact of the proposed regulations, it cannot know what comments may have been filed or what information would have been submitted by the public. The D.C. District court upheld the importance of notice in the IRFA when it remanded a rule by the Bureau of Land Management stating:

> "While recognizing the public interest in preserving the environment, the court also recognizes the public interest in preserving the right of parties which are affected by government regulation to be adequately informed when their interests are at stake and participate in the regulatory process as directed by Congress.[22]

The Commission cannot build an adequate FRFA on a deficient IRFA, just as it cannot adopt a final rule without a proper notice and comment period.

b. The Commission Cannot Use Third-Party Comments to Excuse it's Statutory Duty under the RFA

Also, the Commission's failure to meet a statutory duty in the IRFA cannot be excused by the independent action of third parties. The RFA placed a very specific list of duties on the federal agencies when preparing an IRFA.[23] At no point in the RFA does Congress state that a federal agency is excused from meeting these duties because of comments by third parties. The reason for this is straight-forward – one of the principle purposes of the RFA is to notify small

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21 FNPRM, Appendix C, para. 4.
22 *Northwest Mining Ass'n v. Babbit*, 5 F. Supp. 2d 9, 14-15 (D.D.C. 1998).
23 5 U.S.C. § 603(b)-(c).

businesses of a rulemaking that will affect them. If the IRFA is insufficient, small businesses do not receive adequate notice to respond to an agency's rulemaking.

If an agency could rely on third-party comments to satisfy its duty under the RFA, it would have no incentive to make any effort to comply with the statute. Instead, the agency could produce a perfunctory IRFA without any regulatory flexibility analysis and claim that comments received were a sufficient substitute for analysis by the agency. This is plainly against the intention of Congress, which wanted the agencies to consider the impact their rulemakings had on small businesses. Therefore, as a federal agency, the FCC has a statutory duty to prepare and publish an IRFA which adequately address each of the five requirements listed in § 603 of the RFA, irregardless of the comments received.

Conclusion

Advocacy believes that the FNPRM does not provide sufficient notice of the proposal and does not provide sufficient notice to provide a basis for a rulemaking. Also, the Commission's IRFA is flawed and does not identify all small businesses impacted, adequately detail the compliance burdens, or discuss alternates to minimize the regulatory burden on small businesses. Finally, the Report and Order's FRFA is invalid as the Commission did not remedy the insufficient notice of the IRFA to the Notice of Proposed Rulemaking, and it cannot rely upon third-party comments to excuse its statutory duty under the RFA. Advocacy recommends that the FCC take all comments received in response to the FNPRM into consideration, but it should issue a second further notice of proposed rulemaking along with a revised IRFA before adopting a rule on line sharing.

Respectfully submitted,

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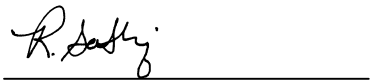
July 22, 1999

CERTIFICATE OF SERVICE

I, Rosa Sobhraj , do hereby certify that on this 22nd day of July, 1999, I have served a copy of the foregoing document via first class mail to the following:



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